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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 291

MARION KOTCH, ET AL.,

Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANTS.

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ARGUMENT.

The appellees advance a novel argument. They argue that pilots and pilotage are beyond the scope of the Fourteenth Amendment. On page 48 of their brief, they state:

> "What is discussed in Yock Wo v. Hopkins is the protection of a right guaranteed under the Fourteenth Amendment to the Constitution of the United States to engage in a common calling. Pilotage is not a common calling."

On page 40, the appellees state:

> "It would serve no useful purpose to parade the various cases showing the power of the State to regulate various occupations free of the prohibition of the Fourteenth Amendment."

The appellees state, on page 45:

> "Many occupations are beyond the limitation of the Fourteenth Amendment."

Much is written in the law books on the subject of pilot laws. But there is no authority, anywhere, to support the argument that pilots are beyond the Fourteenth Amendment's pale.

Act 54 of 1908, as amended, will not stand the test of the Fourteenth Amendment. The appellees take the only course that is left open to them, in taking the position that they are beyond its scope. They are forced into that position, realizing as they must that an arbitrary grant of power, such as this pilot law contains, will not stand the test.

The appellees admit, quite frankly, that the apprentice provision in Act 54 of 1908 is mandatory; and that only those who are first selected as apprentices by the commissioned pilots may be considered by the governor for appointment. And the appellees judicially admit that thus the commissioned pilots are given airtight control,— to exclude all except those having their favor. The appellees say, on page 21 of their brief:

> "In granting the authority to form an association [Crescent River Port Pilots Association], which was

a special grant, apart from the general statute for the formation of corporations, the Legislature doubtless recognized that the members of this Association live in such close community that they would want to choose those with whom they must, for a large part of their lives, live with. It did not impose upon those commissioned, as a condition precedent to forming the association, the obligation to admit into the association specified individuals. It did not say to the Association that it must admit as apprentices those possessing specified qualifications. It left to the members of the Association the choice of those whom they were willing to train for the possibility of being commissioned. Presumably, the Legislature thought that the members of the Association were best fitted to select those whom they desired as apprentices who might thereafter live almost a family life."

The issue here is plainly drawn. It is simply this:—Does the Fourteenth Amendment extend to pilots? Admit that it does and this pilot law must fall. And there can be no doubt that pilots do come within the protection of the Fourteenth Amendment.

The Fourteenth Amendment declares that no state shall "deny to *any person* within its jurisdiction the equal protection of the law". (Italics ours.) No one is excluded. The guaranty applies equally to persons following pilotage as to persons in any other calling. A state may, under the police power, regulate any occupation or profession that is vested with public interest. The appellees argue that the authority to *regulate*, under the police power, carries with it the power to *discriminate*;—which is not so.

It is well settled that police regulations by a state must conform with the equal protection guaranty of the Fourteenth Amendment. In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, (1902), this court said:

> "The question of constitutional law, to which we have referred (the equal protection of the laws), cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law'. The state has undoubtedly the power by appropriate legislation, to protect the public morals, the public health, the public safety; but if, by their necessary operation, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat. 1,210, 6 L. ed. 23, 73; Sinnot v. Devenport, 22 How. 227, 243, 16 L. ed. 243, 247; Missouri, K & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 19 Sup. Ct. Rep. 488."

As a matter of fact, *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52, relied upon by the appellees, holds that pilots are entitled to the protection of the Fourteenth Amendment. The court said:

> "The defenses raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the state of Texas had power to enact laws regulating pilotage in the ports of that state; and, second, if such power existed, whether the provisions of the state statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain provisions of such a character as to cause them to be repugnant to the 14th Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce."

See also *Chicago, B. & Q. R. Co. vs. Chicago*, 166 U. S. 226, 41 L. Ed. 979, where the court said:

> "But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state'. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it'. Ex parte Virginia, 100 U. S. 339, 346, 347 (25:676, 679); Neal v.

quire like approval from some board or other state agency. Explaining its ruling, the court said in *Lehon v. Atlanta, supra:*

> "The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the state has been too recently explained to need further enunciation. The present case is easily within its principal. It would be very commonplace to say that the exercise of police is one of the necessary activities of government, and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide in effect that all who engage in it or are connected with it as a business shall have the sanction of the state, have the stamp of the state as to fitness and character, take an oath to the state for faithful execution of its duties, and give a bond for their sanction. This the state may do against its own citizens and may do against a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other state."

We earnestly submit that the equal protection guaranty of the Fourteenth Amendment extends to the plaintiff pilots and that Act 54 of 1908, as amended, violates the guaranty.

The appellees relate their conception of pilot operations on the Mississippi River. A large part of their brief is given over to the discussion. There is nothing in the record to support the discussion and hence it has no place

in the brief. The appellees elected (R. p. 22) to try the case out on an exception of no cause of action. They might have tendered the issue now made in an answer regularly filed. Then the plaintiffs, appellants here, would have had an opportunity to meet the issue and present their side. The discussion *dehors* the record of course will be disregarded by Your Honors.

The purpose of this argument *dehors* the record is plain. The appellees would have Your Honors believe that this discriminatory pilot law is necessary because of practical considerations. The appellees state, on page 21 (see above), that the commissioned pilots together "live an almost family life". Therefore, they argue, the pilots should be given the right to select their associates. Their argument is that monopoly makes for better efficiency in pilotage.

There is no force in the argument. In the first place, the Constitution of the United States must be obeyed. And in the second place, there is no reason—practical or otherwise—for a discriminatory law in respect to pilotage. The federal statute governing pilotage of coastwise vessels, Sec. 4444, Revised Statute of the United States (46 U. S. C. A. Sec. 215) is not discriminatory. Anyone possessing the required qualifications as to skill, character, et cetera, is entitled to a federal license. (The plaintiff pilots hold first class federal pilot licenses.) The federal law was derived from Act of February 28, 1871, Sec. 51, 16 Stat. 455. Congress might have repealed the law at any time, the effect of which would have been to give over to the state coastwise pilotage for state regulation and control.

The fact that Congress has retained control of coastwise pilotage is proof at least that Congress considers that coastwise shipping is functioning satisfactorily.

Pilots on coastwise vessels have the same duties and responsibilities as those on foreign trade vessels. There is no difference between the two classes of vessels as to size, tonnage and the like. As a matter of fact, some vessels sometimes sail in coastwise trade under enrollment and other times under registry in foreign trade. The vessels ply the same course on the Mississippi. The appellees refer to the hardships and conditions which commissioned pilots on foreign trade vessels must face. They face no hardship or condition that pilots on coastwise vessels do not face.

It is unsound in the extreme to argue that a pilot monopoly is needed for foreign shipping but not for coastwise shipping. We remind Your Honors that the appellees here advancing the argument are beneficiaries of the monopoly.

The appellees state, on page 16:

> "In 1908, the Legislature enacted the statute under attack, whereby it created the Board of River Port Pilot Commissioners to recommend to the Governor applicants for commissions as pilots. This act was in substance like Act 63 of 1877 under which the Associated Branch Pilots was created."

The appellees are in error—there is no similarity between Act 63 of 1877 and Act 54 of 1908 in respect to admittance of pilots. Act 63 of 1877 declares that anyone

of good character passing the pilot examination is eligible, stating:

> "The Board of Examiners of Pilots shall meet on the first of May and the first of October of every year in the City of New Orleans, or such other place as may be designated after thirty days notice in the official journal of this State, where they shall hold an examination, which shall be open to all who may wish to attend, to decide upon the qualifications of applicants for the office of branch pilots of the port of New Orleans, and the said Board of Examiners, shall issue certificates to all candidates who may pass a satisfactory examination, and who shall present certificates of good character satisfactory to said board."

The appellees state on page 34:

> "The case is ruled by Olsen v. Smith, 195 U. S. 332, and Ring v. Oregon, 276 U. S. 607. Olsen v. Smith, affirmed the constitutionality of a Texas statute which, in substance, is the same as the legislation under attack here. Ring v. Oregon came here on error to the Supreme Court of the State of Oregon, upholding the constitutionality of a similar statute. It was argued here on December 13th and 14th, 1927, and was decided on March 19, 1928, by a per curiam opinion reading:
>
> "'Affirmed on the authority of Olsen v. Smith, 195 U. S. 332, 342, 343, 345.'"

We pointed out in our original brief that *Olsen v. Smith, supra*, does not support the appellees. *Ring v. Olsen, supra*, certainly does not support them. Ring was prosecuted criminally for piloting a foreign trade vessel without a

license from the State of Oregon, in violation of one of its laws. The case has no bearing on the question of discrimination in the issuance of state licenses. The state decision is reported: 122 Or. 644, 259 P. 780.

Respectfully submitted,

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This is to certify that copies of this Brief have been served opposing counsel on this ... day of February, 1947.

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